

CCASE:
MSHA V CF&I STEEL
DDATE:
19801202
TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, DC
December 2, 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. DENV 76-46

v. IBMA No. 77-10

CF&I STEEL CORPORATION

DECISION

This proceeding was initiated when CF&I Steel Corporation filed an application for review of an order of withdrawal issued on December 5, 1975, pursuant to section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. 1/ The administrative law judge

1/ Section 104(c) of the 1969 Coal Act provided:

(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an

order requiring the operator to cause all persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspector of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine. [Emphasis added.]

~3460

granted CF&I's application for review and vacated the order, on the ground that the Mining Enforcement and Safety Administration (MESA) failed to prove that there had been no intervening "clean" inspection of the entire mine, within the meaning of section 104(c)(2). MESA appealed. 2/ We affirm the judge.

The withdrawal order alleged, inter alia, that a section 104(c)(1) withdrawal order had been issued on August 6, 1975, and that no inspection of the entire mine had been made since August 6, 1975 which disclosed no similar violation. The judge found that MESA had conducted two complete regular quarterly inspections of this mine between (1) July 25, 1975 and September 25, 1975 (this inspection took 23 days--19 of which were after the section 104(c)(1) order of August 6 1975); and (2) October 2, 1975 to December 16, 1975 (this inspection took 15 days--11 of which were prior to the section 104(c)(2) order of December 5, 1975). Of the 38 inspection days required to complete both inspections, 30 were in the period between August 6 and December 5, 1975. The MESA inspector testified that he did not know whether a complete mine inspection had occurred during those 30 inspection days, but that it was possible. MESA argued, however, that a "clean" inspection of the entire mine within the meaning of section 104(c)(2) occurs only when MESA conducts a regular quarterly inspection from beginning to end after the underlying section 104(c)(1) order has been issued. The judge disagreed stating:

The evidence presented is not sufficient to support a finding that there has not been a complete inspection of the entire mine following the issuance of the 104(c)(1) order which disclosed no similar violations. I cannot conclude, simply because MSHA had not completed an entirely new 3 month cycle of inspections following the issuance of the (c)(1) order, that there had not, in fact, been an intervening "clean" inspection of the entire mine. [Decision at 4.]

He concluded that MESA had not presented a prima facie case to show that a "clean" inspection of the entire mine had not occurred in the period between the two orders.

2/ On March 8, 1978, this case was pending on appeal before Secretary of Interior's Board of Mine Operations Appeals under the 1969 Coal Act. This appeal is before the Commission for disposition under section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C.A. §961 (1978).

~3461

We agree with the judge that a prerequisite to the issuance of an order of withdrawal under section 104(c)(2) of the 1969 Coal Act was the absence of an intervening "clean" inspection of the entire mine, and that it was MESA's obligation to present a prima facie case of that fact to sustain the order.

We also agree that MESA failed to prove this prerequisite in this case. The requirement of a clean inspection before an operator could avoid being subjected to section 104(c)(2) withdrawal orders was intended to further public interest in promoting earnest and continuous compliance with mandatory safety and health standards. Nothing in the record, however, suggests that the Secretary's position--that only a complete regular quarterly inspection can constitute a "clean" inspection of the entire mine--is necessary to achieve this interest.

Accordingly, the judge's decision is affirmed.

~3462

Distribution

Ronald E. Meisburg, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

John F. Welborn, Esq.
Welborn, Dufford, Cook & Brown
1518 United Bank Center
Denver, Colorado 80202

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005